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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 158

CHARLES E. SULTON and MICHELLE SULTON, his wife,

Petitioners,

—v.—

FRANK R. SCHOEN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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—v.—

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered May 9, 1969.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's order of remand is unreported and is set forth in the Appendix, p. 1a, *infra.*

The opinion of the United States District Court for the District of Maryland is unreported and is set forth in the Appendix, p. 3a, *infra.*

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered May 9, 1969.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1) to review the Court of Appeals' affirmance of the district court's order remanding respondents' civil action against petitioners to the state court from which it was removed pursuant to the federal civil rights removal statute, 28 U. S. C. §1443(1).

Question Presented

Are the Court of Appeals' restrictions on civil rights removal jurisdiction consistent with decisions of this Court and the Court of Appeals for the Fifth Circuit?

Statutes Involved

This case involves the operation of 28 U. S. C. §1443(1) as it pertains to the protection afforded rights conferred by 42 U. S. C. §3617.

1. 28 U. S. C. §1443(1) provides:

§1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State Court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; . . .

2. 42 U. S. C. §3617 (enacted as §817 of the Fair Housing Act of 1968) provides:

§3617. Interference, coercion, or intimidation; enforcement of civil action.

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action. [Pub. L. 90-284, Title VIII, §817, Apr. 11, 1968. 82 Stat. 89.]

Statement of the Case

Petitioner Charles E. Sulton, a Negro, lives with his wife Michelle, who is white, in a home in an otherwise all-white subdivision known as Captain's Cove in Oxon Hill, Prince George's County, Maryland (R. 6).

On September 13, 1968, their immediate neighbors, respondents herein, claiming that the Sultons were a nuisance, brought suit against them in the Circuit Court of Prince George's County, seeking $300,000.00 in damages and injunctive relief. In support of their claim for damages, respondents alleged that, since the Sultons had

moved into the neighborhood, they had caused or permitted "loud and offensive sounds, including threats, name calling, insults and cursing . . . telephone calls, gesturing and untrue accusations to the police, as well as by shining lights into the plaintiffs' windows . . . " (R. 17).

In support of their claim for injunctive relief, respondents, suing on their own behalf and on behalf of other white neighbors, alleged that, since the Sultons had moved into the neighborhood, they had engaged in "name calling, insulting, cursing, gesturing, assaulting, making untrue accusations against the neighbors to the police, the building inspector, the electrical inspector, the FBI, the Senate of the United States, the House of Representatives of the United States and the Defense Department of the United States, and shining lights during the night into their windows" (R. 20).

The Sultons removed the case to the United States District Court for the District of Maryland pursuant to 28 U. S. C. §1443(1), the federal civil rights removal statute, claiming that the suit was completely baseless and yet another stratagem in the neighbors' persistent campaign to force them—because of Mr. Sulton's race—from the white neighborhood (R. 8-9). Included in this campaign have been the direction of shotgun fire, cherry bombs and other explosive devices at the Sultons' home; the destruction of a wire fence separating their home from the home of respondents Wood; the staining of the Sultons' canvas awnings by the placing of wild berries thereon; the uttering of racial epithets at the Sultons; the making of malicious charges of the Sultons' misconduct to the police and other officials of Prince George's County; and the making of false and malicious reports of misconduct to the United

States Department of Defense, where Mr. Sulton is employed, and to the Immigration and Naturalization Service (Mrs. Sulton is a naturalized citizen) (R. 6-7).

The Sultons claimed that this campaign of harassment to force them from the white neighborhood deprived them of rights under §817 of the Fair Housing Act of 1968, set forth, p. 3, *supra*, which protects from interference, coercion, or intimidation the quiet enjoyment of housing covered by the Act.

The district court refused to afford petitioners an evidentiary hearing to prove their claims and disallowed removal on the pleadings, holding (R. 109; App. p. 11a, *infra*):

> No federal law permits a man to disturb and harass his neighbors and no federal law prohibits a neighbor from suing a neighbor to enjoin a possible nuisance. Yet, if the Sulton claim is true, if his neighbors are attempting to harass and deprive him of his right to own and enjoy his home in that community because of his race or his interracial marriage, then a grave injustice is being done to him. But Sulton has made no allegation, nor do I think he can in good faith make an allegation, that the judges and/or other officials of the State of Maryland, particularly of Prince George's County, have exhibited conduct which could possibly be construed as evidence that his federal civil rights will inevitably be denied by them.

The district court granted a stay of its remand order pending appeal to the Court of Appeals for the Fourth Circuit. That court, on May 9, 1969, vacated the stay and summarily affirmed the district court's judgment on the

district court's opinion and the opinion of the Court of Appeals for the Second Circuit in *New York* v. *Davis,* Second Circuit, No. 32989, decided March 28, 1969, petition for writ of certiorari filed April 28, 1969, No. 2006 Misc.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Correct the Court of Appeals' Restrictive Construction of Civil Rights Removal Jurisdiction, Which Cripples the Protection Due Civil Rights and Conflicts With Decisions of This Court and the Court of Appeals for the Fifth Circuit.

The district court refused petitioners an evidentiary hearing to prove their case for removal for two reasons:

1. Petitioners made no allegation that the Maryland courts would refuse to fairly entertain their federal claims; and,

2. "No federal law permits a man to disturb and harass his neighbors" (R. 109; App. p. 11a, *infra*).

The first ground of decision is plainly inconsistent with this Court's decisions in *Georgia* v. *Rachel,* 384 U. S. 780 (1966) and *Greenwood* v. *Peacock,* 384 U. S. 808 (1966). Petitioners made no such allegation because this Court has squarely held that §1443(1) "does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial" (*Peacock, supra,* 384 U. S. at 828). In *Rachel, supra,* this Court allowed removal quite without regard to the fairness of the judges and/or other officials of the State of Georgia or the possibility that the removal petitioners there

"might eventually prevail in the state court" (384 U. S. at 805).

Rather, this Court held in *Rachel* that civil rights removal jurisdiction is available in the service of rights granted by a law providing for equal civil rights whenever these rights are denied by the mere pendency of a state criminal prosecution.[1]

The second ground of the district court's decision is more troublesome because of its cryptic brevity.

Petitioners did not claim in the district court, nor do they claim here, a federal right to disturb and harass their neighbors. Quite the contrary. Petitioners claimed that the suit against them was completely baseless and yet another device in the white neighbors' campaign to resegregate the neighborhood, in violation of the Sultons' rights under the Fair Housing Act of 1968.[2]

Indeed, the district court conceded that if the Sultons' version of the facts were true, a "grave injustice" was being done them. Nonetheless, the district court refused petitioners an evidentiary hearing to prove their version of the facts.

Although the district court did not elaborate its reasoning, the Court of Appeals apparently based its affirmance

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[1] The courts below assumed for purposes of decision that §817 is a law providing for equal civil rights which immunizes from state prosecution the quiet enjoyment of fair housing rights. Briefing of this issue can await plenary consideration.

[2] This assumes, of course, that the housing in question is covered by §§803-06 of the Fair Housing Act. The courts below so assumed, and this Court should, as it did in *Georgia* v. *Rachel*, 384 U. S. 780, 805, n. 31 (1966), direct the district court, on remand, to determine coverage.

on the reasoning of *New York* v. *Davis, supra,* decided after the district court's decision and now pending on writ of certiorari in this Court, No. 2006 Misc.

In *Davis,* the Court of Appeals for the Second Circuit held that civil rights removal jurisdiction is limited to cases in which the state proceeding openly and specifically attacks conduct protected by a federal law providing for equal civil rights. Thus, the Second Circuit read *Rachel* as sustaining removal because the state prosecution of Rachel for trespass openly and specifically attacked the mere presence of Negroes in an establishment covered by Title II of the Civil Rights Act of 1964. Under the *Davis* analysis endorsed below, if Rachel had been charged with, say, creating a nuisance in the restaurant by using loud and offensive language, then this Court would have disallowed removal, while refusing him an evidentiary hearing to prove that the state charges were a baseless ploy designed to harass him for the purpose of denying him his rights to equal public accommodations.

Petitioners urge that certiorari be granted to correct this misreading of *Rachel,* which offers a plain and easy path to evasion of the protection due civil rights.[3]

The Court of Appeals for the Fifth Circuit has consistently blocked this path to evasion, and its decisions are in direct conflict with the decision below. Most recently,

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[3] This danger of evasion is not merely speculative. Mardon R. Walker, who sought nondiscriminatory treatment in the place of public accommodation involved in *Rachel* and whose trespass conviction was reversed by this Court in *Walker* v. *Georgia,* 381 U. S. 355 (1965), was reindicted after this reversal on the same facts for a crime other than trespass (malicious mischief). She removed her prosecution to the United States District Court for the Northern District of Georgia, which afforded her an evidentiary hearing but disallowed removal. See *Walker* v. *Georgia,* Fifth Circuit, Nos. 26271 and 26332, appeals pending.

in *Walker* v. *Georgia,* 405 F. 2d 1191 (5th Cir. 1969), the removal petitioner, a Negro, was charged with assault against some white persons outside a restaurant. He alleged in his removal petition that the charge was false and simply fabricated by those persons to keep the restaurant segregated. The district court refused to resolve the factual dispute, and the Court of Appeals held this to be error, in language particularly pertinent here (405 F. 2d at 1192):

> The [district] court stated that it was expressing no opinion one way or the other as to what actually happened when appellant sought service at the restaurant and during the altercation which followed. Rather, we perceive that the Court heard evidence only to the point of determining whether the state was in good faith contending that Walker committed acts which were not immune from state prosecution. The Court went on to hold that the conduct *charged,* mainly assault, was not so immune. This, the Court could not do, without resolving the facts surrounding the altercation with respect to assault *vel non* . . . We reiterate what we said in *Wyche* [v. *Louisiana,* 394 F. 2d 927 (5th Cir. 1967)],[4] i.e., that it is *not* the state *charge*

[4] In *Wyche,* the removal petitioner was charged with aggravated burglary and he removed, claiming that the charge was motivated by an attempt to prevent his enjoyment of a truck stop covered by Title II of the Civil Rights Act of 1964. The Court of Appeals reversed the district court's refusal to afford the removal petitioner an evidentiary hearing. See also *Achtenberg* v. *Mississippi,* 393 F. 2d 468 (5th Cir. 1968) (vagrancy prosecution held removable).

No different rule applies to civil cases. Section 1443 does not distinguish between "civil actions or criminal prosecutions." Nor could it reasonably do so: a different result could not have been reached in *Rachel* if the restaurateur had brought a civil suit against Rachel seeking to restrain him on grounds of race from "trespassing" in the restaurant.

which controls; rather, what appellant was actually doing with respect to the exercise of his federally protected rights. (Emphasis added.)

Not only does the decision below offer those who would deny federal civil rights an easy device to defeat the federal jurisdiction enacted to protect these rights, but it is inconsistent with accepted practice in the federal courts in dealing with removal petitions, whether in civil rights cases or others. That practice does not leave the federal courts powerless to inquire, by the taking of evidence if necessary, into the true nature and circumstances of the cause sought to be removed, whatever its paper coating in the state courts. See *Kentucky* v. *Powers,* 201 U. S. 1, 33-35 (1906); *Wilson* v. *Republic Iron and Steel Co.,* 257 U. S. 92, 97-98 (1921).[5] Under the Fourth Circuit's reading of *Rachel,* the only way the protection of the civil rights removal jurisdiction would be available to the Sultons was if their neighbors had sued to evict them for integrating the neighborhood. But there is no such cause of action in Maryland, so, petitioners claim, the neighbors employed what law was available to the same illicit end. This is a serious and important claim, and petitioners should have a chance to prove it.

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[5] Petitioners do not ignore language in *Greenwood* v. *Peacock,* 384 U. S. 808, 826-27 (1966), which seems to suggest that removal may be defeated by the plaintiffs' choice of cause of action. But, in the context of the Court's holding that the removal petitioners there had not invoked a federal equal civil rights statute which protected their conduct and entitled them to removal, this dictum cannot be regarded as overturning the long-settled rule that, absent an evidentiary hearing, the factual allegations of the removal petition are to be taken as true. *Kentucky* v. *Powers, supra.*

CONCLUSION

For the foregoing reasons, petitioners pray that the writ of certiorari be granted.

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APPENDIX

APPENDIX

Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 13,395

FRANK R. SCHOEN, and DOROTHY L. SCHOEN, his wife, and ERNEST M. WOOD and JANICE G. WOOD, his wife, and FRANK R. SCHOEN, DOROTHY L. SCHOEN, ERNEST M. WOOD, JANICE G. WOOD, for themselves and all others similarly situated,

Appellees,

versus

CHARLES E. SULTON and MICHELLE SULTON, his wife,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

(Argued May 8, 1969 Decided May 9, 1969.)

Before:

BOREMAN, WINTER and CRAVEN, *Circuit Judges.*

MELVYN ZARR (Jack Greenberg, Norman C. Amaker, Anthony G. Amsterdam and Gerald A. Smith on brief), *for Appellants,* and ELSBETH L. BOTHE and RONALD A. WILLONER, *for Appellees.*

PER CURIAM:

This is an appeal from an order of the District Court for the District of Maryland remanding the case to the Circuit Court of Prince George's County, Maryland, from which it had been removed to the court below on petition of the appellants.

We affirm on the opinion of the district court, *Frank R. Schoen et al.* v. *Charles E. Sulton et al., Charles E. Sulton et al.* v. *Frank R. Schoen et al.*, —— F. Supp. —— (D. Md.), Civil Action No. 19922, March 14, 1969. See also *New York* v. *David Davis,* opinion by Judge Friendly, —— F. 2d ——, 37 Law Week 2584 (2 Cir. March 28, 1969).

Affirmed.

Opinion and Judgment of the United States District Court for the District of Maryland

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

No. 19922 Civil Action

FRANK R. SCHOEN and DOROTHY L. SCHOEN, his wife and ERNEST M. WOOD and JANICE G. WOOD, his wife and FRANK R. SCHOEN, DOROTHY L. SCHOEN, ERNEST M. WOOD, JANICE G. WOOD, for themselves and all others similarly situated,

—v.—

CHARLES E. SULTON and MICHELLE SULTON, his wife.

CHARLES E. SULTON and MICHELLE SULTON, his wife,

—v.—

FRANK R. SCHOEN and DOROTHY L. SCHOEN, his wife and ERNEST M. WOOD and JANICE G. WOOD, his wife, JOHN CROWLEY and ROBERTA CROWLEY, his wife; MRS. HARRY KEEN; JOE KEEN; L. H. MATTINGLY and KITTY MATTINGLY, his wife; THOMAS O'LOUGHLIN and LIBBIE O'LOUGHLIN, his wife; FREDERICK F. PFLUGER and AUDRA PFLUGER, his wife; ROLAND ROBISON and JOYCE ROBISON, his wife; HOWARD RUDNICK and EVA RUDNICK, his wife; ROGER SHOCH and ANN SHOCH, his wife; A. R. WREN and BETTY WREN, his wife and WILLIAM F. ROBIE and KATHLEEN ROBIE, his wife.

Filed: March 14, 1969

RONALD WILLONER, College Park, Maryland, and ELSBETH LEVY BOTHE, Baltimore, Maryland, *for plaintiffs and counter-defendants, Schoen and Wood.*

GERALD A. SMITH, Baltimore, Maryland, *for defendants and counter-plaintiffs.*

NORTHROP, *District Judge*:

This controversy began when the plaintiffs, who are neighbors of the defendants, filed suit to enjoin a nuisance in the Circuit Court of Prince George's County.[1] Defendants petitioned to remove the case to this court pursuant to 28 U. S. C. §1443(1). After removal to this court the defendants answered and counterclaimed against the original plaintiff and other neighbors. The gist of this entanglement is that Schoen and other neighbors who originally joined in his complaint allege that Sulton and his wife, an interracial couple, have caused incessant turmoil in their neighborhood including arguing, bickering, and assaulting various neighbors culminating in false accusations to the local police, the FBI, and other agencies of the government. Defendants allege in their counterclaim and by way of defense that it is the plaintiffs and other neighbors, motivated by racial prejudice to their marriage, who have threatened and harassed them with firecrackers, racial epithets, and other harassing action including false accusations to the Department of Defense (where Sulton works) and the United States Immigration and Naturalization Service (Mrs. Sulton, French by birth, is a natural-

[1] As can be seen by the statement of fact, and as represented by counsel for both sides, this neighborhood conflict has been developing for some time prior to the institution of suit.

ized citizen). Schoen and the other original plaintiffs now seek to challenge the propriety of removal of this case to the federal court.

Removal was pursuant to the civil rights' removal provisions of §1443(1) of Title 28 which read:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof . . . .

It is the position of Schoen that this case can properly be removed only if two qualifications are present: (1) the cause of action instituted in the state court is one which infringes upon civil rights specifically granted or protected by a federal law, and (2) these rights will be denied or cannot be enforced in the state courts. Defendant Sulton and his wife would have us hold that the bringing of this suit in the state court is in itself a denial of the civil rights of the defendants. Sulton contends that this suit has been brought or motivated by racial prejudice to harass Sulton and his wife and, thus, the suit itself is in violation of the defendants' federal civil rights to own and enjoy property and home as guaranteed by 42 U. S. C. §1982 and 42 U. S. C. §3617 (§817 of the Fair Housing

Act of 1968).[2] Defendant also argues that this court must hold an evidentiary hearing (which, as a practical matter, would involve hearing the entire substantive case) to decide if the Schoen suit is motivated by racial prejudice. According to the defendants, if this court so finds racial motivation, it must halt or insure the cessation of further state court proceedings against the Sultons. Counsel for Sulton concedes that under the procedure he has outlined, if the court determines the suit is not racially motivated, then the case must be returned to the state court. In support of his theory, defendant primarily relies upon two cases, *Georgia* v. *Rachel,* 384 U. S. 780 (1966) and *City of Greenwood* v. *Peacock,* 384 U. S. 808 (1966).

Upon consideration of defendants' theory and his authorities, the court emphatically agrees with the plaintiff that the case must be remanded to the state courts. While all citizens have a right to be free from vexatious litigation and, *assuming without deciding* that plaintiffs have a right under federal civil rights' legislation to be free from legal and other harassments in owning and enjoying their home, the mere fact that one party believes that a suit has been brought to vex him is not cause to remove that case to federal court. To remove a case to federal court one must have more than an infringement of a federally-protected

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[2] This section reads: Interference, Coercion, or Intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603 (803), 3604 (804), 3605 (805), or 3606 (806). This section may be enforced by appropriate civil action.

civil right; there must be showing that the state courts will not fairly enforce that right, *Baines* v. *City of Danville,* 357 F. 2d 756 (4th Cir. 1966); *Maryland* v. *Brown,* —— F. Supp. —— (D. Md. 1968 [Criminal No. 28193 decided January 23, 1969]. See also *House* v. *Dorsey,* Misc. No. 504 decided by the United States Court of Appeals for the Fourth Circuit on November 22, 1968.[2a]

Here there has been no showing and no allegation that the courts of Prince George's County, Maryland, or any other county[3] are racially prejudiced as to the defendants so as to deny their legitimate federal civil rights or any other rights which they seek to enforce. If after hearing the evidence in this case, the state court determines that the Schoen suit has been brought to vex and harass defendants and is motivated by racial prejudice, it has full judicial power to remedy that wrong. Indeed, whatever decision the state court may reach in this matter, as a local court it is in far better position to judge the injunctive needs, if any, of these people and to enforce any remedy it might choose to grant.

Rachel and *Peacock,* contrary to the defendants' argument, support the position this court has taken. In *Rachel* the defendants alleged that they were indicted in a Georgia state proceeding for criminal trespass resulting from their peaceful efforts to obtain service at privately owned Alabama restaurants open to the general public, but not to members of the Negro race, and that these arrests occurred

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[2a] See also Naimaster v. NAACP, —— F. Supp. —— (D. Md. 1969), decided March 5, 1969, by C. J. Thomsen.

[3] Upon written oath of either party this case may be removed to another county in Maryland, Rule 542, Maryland Rules of Procedure, Volume 9B of the Annotated Code of Maryland.

solely in the context of racial discrimination. The Court agreed that if the allegations were true, removal was warranted because

> "[T]he removal petition alleges, in effect, that the defendants refused to leave facilities of public accommodation, when ordered to do so solely for racial reasons, and that they are charged under a Georgia trespass statute that makes it a criminal offense to refuse to obey such an order. The Civil Rights Act of 1964, however, as Hamm v. City of Rock Hill, 379 U. S. 306 (1964), made clear, protects those who refuse to obey such an order not only from conviction in the state courts, but from *prosecution* in those courts. . . . Hence if as alleged in the present removal petition, the defendants were asked to leave solely for racial reasons, then the mere pendency of the prosecutions enables the federal court to make the clear prediction that the defendants will be 'denied or cannot enforce in the court of [the] State' the right to be free of any 'attempt to punish' them for protected activity. . . . The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 as construed in Hamm v. City of Rock Hill, supra." 384 U. S. at 804-5.

In *Peacock,* the defendants alleged that while engaged in civil rights' activities in Greenwood, Mississippi, they were arrested and prosecuted for obstructing the public streets. They claimed these arrests were solely caused by state and city policies of racial discrimination. But the Court speaking, as it did in *Rachel,* through Mr. Justice Stewart denied removal and explained:

"In *Rachel* the defendant relied on the specific provisions of a pre-emptive federal civil rights law . . . that under the conditions alleged, gave them (1) the federal statutory right to remain on the property of a restaurant proprietor after being ordered to leave, despite a state law making it a criminal offense not to leave, and (2) the further federal statutory right that no State should even attempt to prosecute them for their conduct. . . . The present case differs from *Rachel* in two significant respects. First, no federal law confers an absolute right on private citizens—on civil rights advocates, on Negroes, or anybody else—to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman. Second, no federal law confers immunity from state prosecutions on such charges." 384 U. S. at 826.

The Court went on to hold:

"To sustain removal of these prosecutions to a federal court upon the allegations of the petitions in this case would therefore mark a complete departure from the terms of the removal statute, which allow removal only when a person is 'denied or cannot enforce' a specified federal right in the courts of [the] State, and a complete departure as well from the consistent line of this Court's decisions . . . . The civil rights removal statute does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. *Under §1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly*

> *predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.*" 384 U. S. at 828-29. (Emphasis supplied.)

Thus, the clear teachings of *Rachel* and *Peacock* are that the two requirements of §1443(1) must be met to justify removal under the federal civil rights removal statute. Those two requirements are (1) a right guaranteed by federal law, which (2) is denied or cannot be enforced in the State courts. In *Rachel* the Court held that the two requirements would be met and removal would be justified if the allegations were true because under a unique federal statute not only was it a federal civil right to be served in a place of public accommodation, but it was also a federal civil right *to be free from prosecution* for seeking to exercise that right. Thus, the indictment by the state court in violation of the defendants' right to be free from prosecution was evidence or proof that the defendants would "be denied or cannot enforce" their federal civil rights in the state courts.

In *Peacock,* which is more akin to the alleged situation here, the Court found the two requirements were not met because there was and is no federal right to obstruct a public street, and there is certainly no federal right to be free from arrest and prosecution under such charges. As Mr. Justice Stewart noted, if it was true that the arrests and prosecutions of the defendants were based on racial prejudice, where an attempt to deprive the defendant of civil rights guaranteed by federal law, then a grave injustice had been done, but the question then before

the Court was limited to the removability of this case under §1443(1). To that the Court's answer was emphatic:

> "Unless the words of this removal statute are to be disgarded and the previous consistent decisions of this Court completely repudiated, the answer must clearly be that no removal is authorized in this case." 384 U. S. at 831.

The same is true here. No federal law permits a man to disturb and harass his neighbors and no federal law prohibits a neighbor from suing a neighbor to enjoin a possible nuisance. Yet, if the Sulton claim is true, if his neighbors are attempting to harass and deprive him of his right to own and enjoy his home in that community because of his race or his interracial marriage, then a grave injustice is being done to him. But Sulton has made no allegation, nor do I think he can in good faith make an allegation, that the judges and/or other officials of the state of Maryland, particularly of Prince George's County, have exhibited conduct which could possibly be construed as evidence that his federal civil rights will inevitably be denied by them.

In conclusion, the court notes that if the defendant's theory were accepted, federal court would have to hold, at the very least, evidentiary hearings in every case brought in the state court which the defendant alleged was motivated by racial prejudice. Such a result, aside from the immense administrative problems it would pose, would sound the destruction of the independent state judiciary system and would establish a federal judiciary that was never intended by the Constitution or by Congress.

Wherefore, in consideration of the matters set forth in the above opinion, it is this fourteenth day of March, 1969, ORDERED that the plaintiffs' motion to remand this case to the Circuit Court of Prince George's County, Maryland, is hereby GRANTED.

EDWARD S. NORTHROP
United States District Judge

SUPREME COURT, U. S.

FILED

NOV 10 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 158

CHARLES E. SULTON AND MICHELLE SULTON, HIS WIFE,

Petitioners,

v.

FRANK R. SCHOEN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

On the direction of the Court,[1] the respondents respond to the Petition for Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit remanding the civil suit brought by the respondents against

[1] By letter dated October 10, 1969 from the Clerk of the Court to counsel for the respondents. Respondents have throughout taken the position that they oppose removal only to the extent that it delays or prevents hearing on the merits by a court having jurisdiction to grant appropriate relief.

the petitioners to the Circuit Court for Prince George's County, Maryland.

OPINIONS BELOW

The Opinions below are set forth in the Appendix to Petitioners' Petition for Writ of Certiorari.

JURISDICTION

Respondents concur with Petitioners' statement of jurisdiction.

QUESTIONS PRESENTED

1. Is the defendant in a State court civil suit, who makes no claim that he is denied or cannot enforce his rights in the state courts, entitled to an evidentiary hearing on the substantive merits, on a removal petition claiming that the suit is violative of rights protected by federal civil rights legislation?

2. Is the suit here sought to be removed prohibited by the provisions of 42 U.S.C. §3617 (§817 of the Fair Housing Act of 1968)?

STATUTES INVOLVED

The statutes involved are set out under that heading in the Petition.

STATEMENT OF THE CASE

The petitioners are a Negro husband and his caucasian wife and the respondents are among their neighbors in the community known as "Captain's Cove" in Oxon Hill, Prince George's County, Maryland. In their Petition and previous pleadings, the petitioners state that the community is "otherwise all white." There is no evidence of the racial makeup of the community. Respondents maintain that the

fact is irrelevant, but that there are or have been other non-caucasian homeowners in "Captain's Cove".

On September 13, 1968, the respondents brought the suit described in petitioners' statement of the case, asking for an injunction and money damages on account of certain acts of nuisance allegedly committed by the petitioners in their relationship as neighbors of the respondents. The suit was set for hearing on the injunction in the Circuit Court for Prince George's County, Maryland on October 4, 1968. On September 27, 1968, the petitioners removed the suit to the United States District Court for the District of Maryland on a petition claiming that the respondents had committed various acts of nuisance against *them*[2] which along with the bringing of the suit constituted an attempt to "coerce, intimidate, threaten and interfere with Petitioners in their exercise and enjoyment of, and on account of their having exercised and enjoyed rights granted or protected by Title VIII of the Civil Rights Act of 1968." On the same allegations, the Petitioners filed a counter-claim for money damages (but not injunctive relief) in the District Court.

As required by 28 U.S.C. §1446(e), the state court proceedings were stayed by the bringing of the removal action and the petitioners have since, through the filing of appeals from the remands described in their petition, and the obtention of intervening stays[3] averted any judicial determination on the merits of either side.

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[2] Among petitioners' claimed grievances was that the respondents caused their home "to be buzzed by helicopter" (R. 56). Petitioners' other contentions are set out in their statement of the case (pp. 4-5) as established facts, although the claims of both sides remain mere allegations impassed in limbo pending resolution of the removal proceedings.

[3] Petitioners obtained a stay from United States Circuit Judge Boreman pending filing of their Petition to this Court, and from Chief Justice Warren pending the action of this Court on their Petition.

ARGUMENT

THE ISSUES ARE SETTLED BY THE DECISIONS OF THIS COURT WHICH HAVE BEEN CORRECTLY APPLIED BY THE APPELLATE COURT AND THE COURTS OF OTHER CIRCUITS.

The landmark companion cases of *Georgia v. Rachel*, 384 U.S. 780, and *Greenwood v. Peacock*, 384 U.S. 808 (1966) fully discuss and carefully delineate the narrow area in which removal of alleged civil rights prosecutions[4] may be allowed. Its limits comprise the circumstances in which the petitioner is being prosecuted for "activity which is *expressly* protected by a law providing for equal civil rights stated in terms of racial equality," that is, where the law "substitutes a right for a crime."

In *Rachel* where the petitioners claimed to be prosecuted for trespass attendant upon efforts to use facilities covered by Title II of the Civil Rights Act of 1964, this Court found no need to determine whether those petitioners would be denied or unable to enforce their civil rights in the State courts. Entertainment of the prosecution was in and of itself a denial by the State courts of rights protected by the statute.

This Court's opinion in *Peacock* is applicable to the great majority of cases including the instant one, where there is no direct nexus between the prosecution and the protected activity.

The respondents would rest their argument on the well reasoned opinion of Judge Friendly speaking for the Second

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[4] The respondents here refer to either criminal or civil proceedings, and concede as they must from the plain wording of 28 U.S.C. §1443(1) that the statute is applicable to both. However, the *Rachel-Peacock* rationale that the prosecution must be based upon a law of general application from which it can be "clearly predicted," that the petitioner will be unable to enforce or be denied his rights by the state courts would seem to require a different approach to civil cases in which the State is not a litigant.

Circuit in *New York v. Davis*, 411 F. 2d 750 (believed to be the only other removal proceedings under the Fair Housing Act of 1964 which have yet been considered by an appellate court).

Davis sought to remove a New York prosecution for "menacing," claiming that he was innocent and being prosecuted in retaliation for his attempts to move his interracial family into a white neighborhood. As do the instant petitioners, Davis contended that his prosecution came within the *Rachel* confines because it was brought in violation of 42 U.S.C. §3617. Remanding the case without an evidentiary hearing, Judge Friendly reasoned that:

(1) The Fair Housing Act confers no right to menace while the Public Accommodations Act invoked in *Rachel* does confer a right to trespass in places of public accommodation.

(2) Under the *Peacock* doctrine it is not enough to show that the charges are false and intended to discourage petitioner from exercising a federal right.

(3) An evidentiary hearing is only justified to determine whether the conduct charged is within an area withdrawn by federal statute from the ambit of allowable state prosecution, and not for the purpose of determining the subject of the charge.

There is no conflict between the Circuits, which have observed and carefully applied the *Rachel-Peacock* delineation. The Fifth Circuit cases cited by Petitioners (*Walker v. Georgia*, 405 F. 2d 1195; *Wyche v. Louisiana*, 394 F. 2d 927; *Achtenberg v. Mississippi*, 393 F. 2d 478) all involve prosecutions which were claimed to be equivalent to prosecution for trespassing in a place of public accommodation — the one situation excepted by *Rachel*. The Fifth Circuit has never undertaken to overrule *Orange v. Alabama*, 386 F. 2d 829 in which that court remanded a prosecution for

"contributing to the delinquency of minors," despite petitioner's claim that the prosecution was for purposes of interfering with rights protected by the Voting Rights Act.

II.

THE SUIT HERE SOUGHT TO BE REMOVED IS NOT PROTECTED BY THE FAIR HOUSING ACT OF 1968.

The courts below assumed without deciding that the Fair Housing Act protects the quiet enjoyment of fair housing rights. Petitioners suggest (footnotes 1 and 2) that this issue can be held in abeyance. Respondents submit that the law on which petitioners ground their right to removal is so clearly inapplicable to the factual situation alleged, that the case can be remanded to the state courts for this reason without further inquiry.

42 U.S.C. §3617 on which the removal is founded makes it unlawful to interfere with any person in the exercise or enjoyment of rights granted or protected by §3603, §3604, §3605, §3606 of the Act. The protected area is sale or rental of housing (§3604), financing of housing (§3605) and brokerage services (§3606).

The removal petition shows on its face that the petitioners are in fact enjoying the rights expressly protected by the Fair Housing Act, that they are purchasing a home in an integrated community which was brokered, sold and financed without discrimination.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for certiorari should be denied.

Respectfully submitted,

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